

STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

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CONTROL COMMISSION

In the Matter of:)
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City Beverage – Markham, LLC, d/b/a City Beverage –)
Markham, City Beverage – Arlington Heights;)
City Beverage, LLC, d/b/a City Beverage – Bloomington;) 12 CCH 001
Chicago Distributing, LLC, d/b/a City Beverage - Chicago)

ILLINOIS LIQUOR CONTROL COMMISSION LEGAL DIVISION
RESPONSE TO RESPONDENTS' PRE-HEARING BRIEF

The Pre-Hearing Brief submitted by Respondents Anheuser-Busch Companies, Wholesaler Equity Development Corporation (WEDCO) and CITY Beverage argued against the revocation of the CITY Beverage distributor liquor licenses because, in their opinion, the intent of the Illinois State Legislature and Governor is to permit an in-state or out-of-state brewer to own a distributorship. They also contend that Respondent Anheuser-Busch/WEDCO ("AB/WEDCO") can own a 30% interest in CITY Beverage because Declaration B of the Commission March 2010 Declaratory Order permits such an interest and because a Commission decision based upon the principles of equitable estoppel would prohibit the revocation of the licenses. For reasons explained in the ILCC Legal Division's pre-hearing legal memorandum, the Commission should continue to construe the Liquor Control Act to prohibit AB/WEDCO from having an interest in City Beverage and, in addition, should refrain from granting equitable relief that the Illinois Legislature did not grant the Commission. Because the Commission lacks the authority to rule on matters of equity and all remaining issues of genuine fact in this matter are not contested (namely, the Anheuser-Busch ownership of distributorships), the Commission

should grant the Legal Division's prior submitted Motion for Summary Judgment in its favor.

A. Statutory Construction

The Illinois General Assembly recently revised the Liquor Control Act and did not authorize Anheuser-Busch or any other brewer to hold distributor licenses and thus prohibits all brewers from owning distributorships. The Legal Division of the Commission has consistently argued this position as applied to Non-resident Dealers (NRD's) and then to all brewers in 2011 after the passage of Public Act 97-0005 ("Craft Brewer Act"). In 2010, the Commission itself similarly construed the statute to prohibit NRD's from owning distributorships (Declaration A of March 2010 Order) which proved to be consistent with the intent of the Legislature upon the passage of the Craft Brewer Act. In 2011, after the passage of the Craft Brewer Act, the Commission interpreted that the Liquor Control Act bans all brewers, in-state and out-of-state, from owning a distributorship. More specifically, the Commission ruled that the prohibition applies to Anheuser-Busch. As a reminder, in the words of the Commission:

It was the intent of the Illinois General Assembly in 2011 to deny AB the right to own a distributorship. We believe this even though the General Assembly did not amend Section 5/6-4(a) to include brewers as parties specifically prohibited from owning distributorships.

Finding F; Findings from the 12/7/2011 Meeting Regarding the Anheuser Busch Ownership Interest in City Beverage LLC.

In our pre-hearing legal memorandum supporting the Motion for Summary Judgment, the Legal Division outlined that the intent of the legislature to prohibit brewer owned distributorships was revealed through: the plain reading of the changes made to the Craft Brewer Act; the statements made by legislators during floor debate of the Craft

Brewer Act; the passage of the Craft Brewer Act within the context of the judicial nullification of brewer owned distributorships; multiple statements made by Anheuser-Busch/WEDCO about the impact of the Craft Brewer Act; and finally, the Commission's own interpretation cited in the above reference to its 2011 findings. We have therefore, arrived at the conclusion that there is no further legal construction argument to make to the Commission especially since it has already answered the interpretative question twice before. Respondents have not offered any new argument that they have not already argued over the past two and a half years or that is consistent with their own prior statements about the effect of judicial or legislative nullification of brewery owned distributorships. In other words, as it relates to the construction of the Liquor Control Act, the Commission needs no further convincing and any further analysis drafted herein about the Act's construction is a waste of time, energy and paper. The Commission has consistently, accurately and recently interpreted the intent of the Legislature to prohibit brewer ownership of a distributorship and specifically "to deny AB the right to own a distributorship."

B. Declaration B

Respondents have argued that the Commission should simply reaffirm its Declaration B from the March 10, 2010 Declaratory Order which permitted AB/WEDCO to continue to hold a 30% interest in CITY Beverage. Thus, if the Commission reaffirmed Declaration B, then the citations seeking the revocation of the CITY Beverage licenses must be summarily dismissed. In Footnote 2 to the Respondents' Pre-Hearing Brief, Respondents even suggest that the Commission reaffirm its entire Declaratory Order which includes the general prohibition against Non-resident Dealer ownership of a

distributor (Declaration A), if reaffirming the entire order, including Declaration B, would dismiss the current citations. Since the Commission's own Legal Division would not challenge the reaffirmation ruling, then the matter would seem to be closed with no further controversy.

If the Commission, however, simply reaffirmed its March 2010 Declarations A and B, then the contested matters before the Commission would be just beginning. In the same Footnote 2 of the Respondents' brief, Respondents make it clear that if the Commission reaffirms its entire 2010 Declaratory Order, "WEDCO reserves its right to contend in any further proceeding that there is no prohibition on WEDCO's ownership of CITY Beverage, and that WEDCO should be allowed to increase its ownership to a full 100%." Anheuser-Busch/WEDCO has never attempted to hide its argument that it is entitled to own 100% of an Illinois distributorship and will not stop with the dismissal of this case. In fact, Commission application records show that Anheuser-Busch/WEDCO has a right to purchase up to 51% of CITY Beverage as early as September 30, 2012 (9 days from now). Therefore, it would make sense to predict that relatively soon after a dismissal of this case premised on Declaration B, Anheuser-Busch will file a change of ownership application with the Commission notifying it that they own 51% of CITY Beverage. Because Declaration B limits WEDCO's interest to 30%, the Legal Division will again advise the Commission to send out violation notices recommending the revocation of the City Beverage licenses because of AB/WEDCO's illegal interest.

If the Commission revokes the AB/WEDCO licenses because of the illegal interest and, if the past is prologue, Anheuser-Busch will undoubtedly find a way to use the Commission's equitable decision against it on administrative review. As they have

done in the past, they will argue that the Liquor Control Act (Act) does not grandfather AB/WEDCO's interest in CITY Beverage so the Commission's decisions in 2010 and (potentially) 2012 to allow AB/WEDCO to retain an interest in a license must be evidence that the Act itself permits it. If there is not a grandfather clause in the Act permitting Anheuser-Busch to own an interest in a distributorship and the Commission has allowed Anheuser-Busch to keep an interest, then the inevitable argument will be that the Act permits it. This will be the same argument AB/WEDCO will use when it seeks to obtain full ownership of CITY Beverage and other future distributorships like River North in Chicago.

In addition to AB contesting this matter after the Commission reaffirms Declaration B, there will be other challenges filed with the Commission by third parties with affected interests. Whether or not third parties specifically have standing to challenge a Commission reaffirmation of Declaration B will be the least of the Commission's concerns. Third parties that find that AB/WEDCO continues to have an unfair competitive advantage by owning distributorships can file a mandamus petition requiring the Commission to evenly apply its own interpretation of the Act prohibiting brewery owned distributorships. They will argue (as the Amici already have) that the Commission ruled outside its authority in making an equitable ruling. In addition to a mandamus action, any brewer, in-state or out-of-state, would be able to seek a distributor's and importing distributor's license from the Commission. The Commission would have to hold hearings on all of these matters and then likely decide, consistent with Declaration A and the Craft Brewer Act, that a brewer is prohibited from holding a distributor's license. Upon being denied the same license issued to one of their

competitors, the third parties could file an Equal Protection claim in federal court arguing that the Commission violated their civil rights. A successful argument would lead to a legitimate petition for attorney's fees and likely subsequent payment by the State. Thus, the controversy merely begins if the Commission reaffirms Declaration B.

On the contrary, the Commission has every right to reconsider Declaration B because of the passage of the Craft Brewer Act and upon its own interpretation that the legislature intended "to deny AB the right to own a distributorship." The reconsideration will result in the likely conclusion of all matters before the Commission because all parties will understand that the Commission's interpretation is final and applies to all parties. Even if AB/WEDCO successfully challenges the Commission's interpretation of the Liquor Control Act to prohibit AB/WEDCO's ownership of CITY Beverage (which is unlikely), the matter will be settled (until the legislature reacts and amends the law). Either way, the Commission's job is successfully accomplished with a reasonable interpretation of the statute and a fair application of that interpretation to all license holders.

C. Equitable Relief and Due Process

The Commission should not feel obligated to allow AB/WEDCO to present evidence related to equitable relief or equitable estoppel in order to ensure AB/WEDCO is granted due process. As has been argued by the Legal Division and the Amici third parties (Amici arguments by ABDI and Miller Distributors incorporated by reference), there is no provision in the Act that allows the Commission to ignore the Act's dictates in the name of equity. Keep in mind that, up to this point, the Respondents have yet to cite a single legal precedent that gives the Commission the authority to make a ruling contrary

to law for purposes of equity. On matters related to statutory construction of the Act of which the Commission does have authority, the Respondents have had three chances to convince the Commission of their version of the law. Thus, the Commission has given Respondents more than ample due process on matters within the scope of its authority.

Furthermore, on equitable or constitutional due process matters, the Respondents are not required to exhaust their administrative remedies before seeking judicial relief. In Arvia v. Madigan, 209 Ill.2d 520, 809 N.E.2d 88 (2004), the Illinois Supreme Court stated there is no requirement that constitutional issues be raised at the administrative level if there is no statutory mandate that they be raised. No such mandate exists in the Liquor Control Act. Furthermore, the Arvia court suggests that there is no mandate to exhaust administrative remedies if the party seeks a separate declaratory remedy. Again, in Bright v. City of Evanston, 10 Ill.2d 178, 184-85, 139 N.E.2d 270, 274, the Supreme Court limits the requirement that a party exhaust its administrative remedies when the effect of a decision “as a whole is to unconstitutionally impair the value of the property and destroy its marketability.” Finally, “[e]xceptions to the exhaustion doctrine have been fashioned in recognition of the rule that equitable relief will be available if the remedy at law is inadequate. Kenilworth Insurance Company v. Fred A. Mauck, 50 Ill.App.3d 823, 827, 365 N.E.2d 1051, 1053 (see also, Horan v. Foley, 39 Ill.App.2d 458, 188 N.E.2d 877 stating “administrative agency has no power to proceed because it lacks jurisdiction).

Therefore, while the Commission might feel compelled to offer the Respondents a hearing on equitable relief, there is no statutory mandate that it make such an offer and the Legal Division strongly recommends that the Commission forego hearing evidence

related to Respondents' equitable claims. The Respondents have the option to raise equitable estoppel in Circuit Court for de novo review. If the Respondents want to use administrative review as their mechanism to challenge a Commission decision, then they can do this too. They have raised their equitable claim and thus may raise the same claims to the Circuit Court on administrative review. If the Commission refuses to hear evidence on equitable claims and the Circuit Court deems that the Commission should have reviewed these evidentiary matters, the Circuit Court could remand, at a later date, for rehearing. In the alternative, the Circuit Court could agree with the Commission's decision to limit the consideration of equitable evidence and undergo its own review. In addition, in the unlikely event that the Circuit Court disagrees with the Commission's construction of the statute to prohibit brewery owned distributorships, then a rehearing on evidentiary matters would be moot anyway. Therefore, there exists no reason for the Commission to hear Respondents' equitable claims at this time. The Commission should stay within the scope of its authority and make a statutory construction ruling on the Legal Division's Motion for Summary Judgment in which there is no genuine issue of material fact on any matter within the Commission's authority to decide.

Respectfully Submitted on September 21, 2012 by,

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STATE OF ILLINOIS)
) SS.
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The undersigned certifies that the foregoing **ILLINOIS LIQUOR CONTROL COMMISSION LEGAL DIVISION RESPONSE TO RESPONDENTS' PRE-HEARING BRIEF** was hand delivered to the Illinois Liquor Control Commission and emailed on September 21, 2012 to: Stephen B. Schnorf, Acting Chairman of the Illinois Liquor Control Commission, at stephenbs@sbcglobal.net, Allyson Reboyras, Commission Secretary at allyson.reboyras@illinois.gov, Thomas J. Verticchio, counsel for City Beverage, at tverticchio@smbtrials.com, Irene Bahr, counsel for Anheuser Busch LLC/WEDCO at irene.bahr@gmail.com and Edward M. Crane, counsel for Anheuser Busch LLC/WEDCO at edward.crane@skadden.com.

/s/ Richard R. Haymaker

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